



REPLY TO:

111 - 19th Street
Wheeling, WV 26003
Telephone: 238-1040

Members
James Paul Geary
Chairman
Orton A. Jones
David L. White

**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**

GASTON CAPERTON
Governor

Offices
240 Capitol Street
Suite 515
Charleston, WV 25301
Telephone 348-3361

MIKE CROW

v.

Docket No. 89-CORR-116

WEST VIRGINIA DEPARTMENT OF CORRECTIONS

DECISION

Grievant Mike Crow is employed by respondent Department of Corrections as a Correction Officer I (COI) at the West Virginia Penitentiary in Moundsville. On March 23, 1989, he advanced the following grievance¹ to level four:

On January 25, 1989, grievant was notified that he was being reassigned from his position as officer in charge of the State Shop, which is considered to be a desirable position, to serve as the Midnight Watch - C Group, which is obviously not considered to be a desirable position. He is to be replaced in the State Shop by COI James Kirby, an officer with fewer years of service and less experience in the State Shop than that of the grievant. This constitutes unfair, arbitrary and capricious treatment which is inconsistent with the policies of the Department of Corrections. Grievant has been performing his duties in the State Shop in a satisfactory manner. Relief sought is reinstatement in the position in the State Shop.

¹The filing form indicated the grievance was denied at levels one through three, February 1, February 2, and March 16, 1989, respectively. The transcript (T3.____) of the March 9, 1989, level three hearing was made part of the record.

A level four hearing was conducted May 4, 1989.² The parties agreed to submit proposed findings of fact and conclusions of law by June 15, 1989.

The basic facts giving rise to the grievance are not controverted. According to a position description of record and testimony by the parties, a COI performs entry level security work at a state correctional institution on a 24-hour basis. Assignments can include shift work to day, afternoon or midnight turn, and weekend work. Duties can include "line" work, i.e., monitor work in the halls and locations where inmates are housed or more desirable assignments to man or work in a recreational or other specialty unit.

Grievant testified at level three that he had been employed at the prison at various times for a total of eleven or twelve years and had served "on the line" in probably every security COI position. He said he had been Recreation Director on two separate occasions for a total of four years. For the past three years, he stated, he was assigned as officer in charge of the State Shop (T3.24). He characterized the shop and director assignments as more "administrative" in nature than security line duty.

²Grievant appeared on his own behalf, and Officer Harry Gillespie, Director of Support Services and supervisor of the State Shop and Inmate Property Room since 1987, testified on behalf of respondent. The hearing was brief and the evidence only supplemented more specific testimony given at level three.

Approximately two and one-half years ago, Officer James Kirby joined grievant at a common work site to serve as officer in charge of the Inmate Property Room.³ According to the testimony at level two, each officer, grievant and Kirby, could perform the duty of the other and did so when the need arose. For example, Officer Kirby performed the combined duties of the property office and state shop last year for four months when grievant was off-work from an injury (T3.11,27).

In his capacity as supervisor of the shop and property office, Officer Gillespie eventually requested permission to combine the two positions into a single position in order to allow one individual to operate both the shop and property room while freeing the other officer for other duties. Permission was granted by Manfred Holland during his tenure as acting warden in early 1989, and Officer Gillespie was given the authority to choose which individual was to hold the combined position. Gillespie chose Kirby to perform the combined duties and grievant was reassigned to security. A supervisor other than Officer Gillespie subsequently placed grievant on line duty within the penitentiary on the midnight shift.⁴

³At one time the State Shop and the Inmate Property Room were housed in separate sections within the Penitentiary, each with an officer in charge of the respective office. Eventually, both offices were located in the same site but each position was still manned by a separate individual.

⁴During the level three proceedings, Officer Gillespie suggested that grievant speak to his present supervisor about his duties and work shift to try to work something else out with respect to his assignment.

At level four grievant opined that, based on his twelve-year work experience in the facility, a de facto promotion system existed within the penitentiary and desirable duty assignments, such as steady day-turn and duty-free weekends, were dependent on knowing the right people and being liked. He stated that after initial training and a few years on the job an officer could get a coveted assignment, "a plum," and, once gotten, the assignment was usually retained if the duty was performed satisfactorily. Based on the system he described, he characterized his reassignment as an unjust de facto demotion inasmuch as he was more senior than Kirby, held the assignment longer and performed his duties satisfactorily. Grievant testified that his attendance and promptness record was no better or worse than that of Officer Kirby and he had trained Kirby and "taught him all he knew." He admitted that Kirby did have a slightly better performance evaluation, but both had good evaluations.

On cross-examination, grievant admitted to an occasion when Officer Gillespie had counseled him while on duty about smelling alcohol on his person. He said it was from drinking the previous night, but that it had nothing to do with how he performed his job.⁵

⁵Grievant denied that he drank any alcohol before coming to the level four hearing and stated that if respondent's counsel smelled alcohol, it was from beer he drank the previous evening.

Respondent proposed that the hearing examiner took notice of grievant's appearance at the hearing and that grievant had
(Footnote Continued)

At level four Gillespie testified that, based upon his observations of both the officers' appearance, promptness for work, and performance of duties, he determined Mr. Kirby to be better suited for the combined duties of the shop and property room. He stated that he had counseled grievant for his personal appearance at work and for the condition of his shop.⁶ He said that, in his opinion, seniority was not necessarily a measure of an officer's ability to perform a certain job. He stated his belief that an officer's neat appearance had a lot to do with job performance and also that an officer should set a good example for the inmate population.

Grievant contends and argues that Officer Gillespie "admitted to possible bias in making the reassignment decision"⁷

(Footnote Continued)

"the odor of alcohol on his breath." See Respondent's Proposed Finding of Fact and Conclusions of Law, 6/12/89.

The undersigned was not aware of alcohol on grievant's breath but did observe that grievant was not cleanly shaven, appeared somewhat ruffled, remained sprawled out in his seat even during examination and did not remove his ballcap during the entire proceeding.

⁶Officer Gillespie stated that he realized the shop was crowded and difficult to maintain and keep neat, but, nonetheless, he believed grievant could have done a better job.

⁷Officer Gillespie's comment at level three was: "As far as being biased, I tried to be as objective as possible, except I agree with Mr. Garvin [grievant's representative] that probably all of us, no matter how objective we try to be, we probably have some bias whether it be a little bit or gigantic." The statement cannot be given weight as an admission of bias on Gillespie's part in the selection process for it obviously was only an agreement that, generally, people do harbor biases of one degree or another.

and did not give enough consideration to seniority when he selected Kirby instead of him for the combined position.⁸

Among other things, respondent contends that objective criteria such as seniority, experience, training, past job performance, appearance during duty, and appearance of the office were appropriately considered to fill the unified shop assignment, in compliance with departmental policy when making personnel decisions, and no policy or statute requires that seniority be more heavily weighted than other criterion. It argues that grievant failed to prove his case.

The issue in this grievance is whether respondent engaged in unfair, arbitrary and capricious treatment of grievant or violated its policies when it reassigned him to duties other than those he had performed in the State Shop.

Respondent's position that its reassignment of grievant was within the scope of its authority, as long as the assignment fell within the duties of grievant's COI job classification, is well taken. Conversely, grievant's position in this matter is not convincing. His theory of de facto promotion-demotion to coveted assignments may be based on administrative practices within respondent's prison facility, and certainly such

⁸ Grievant cited and submitted several decisions issued by the Civil Service Commission when it ruled on employee grievances prior to the enactment of W.Va. Code §29-6A-1, et seq. (July 1, 1988). The cases involved personnel matters other than those detailed herein and were not persuasive, in any event, as to the facts and circumstances of the instant grievance.

assignments based on favoritism would clearly be arbitrary and capricious. However, no evidence was presented in this instance to support a finding that favoritism was a factor in the decision to retain Officer Kirby in the combined assignment in question. Moreover, the evidence in the instant case shows that respondent made a rational personnel decision based upon the belief that the physical appearance and demeanor of an officer could have an impact on inmates and a well-groomed officer would most likely have a more positive impact than an unkempt officer.

In addition to the foregoing narration, the following findings of fact and conclusions of law are made.

FINDINGS OF FACT

1. Grievant, a COI, has been an employee of the West Virginia Department of Corrections since October 1981, but had attained twelve years of overall experience at the Penitentiary in Moundsville from prior employments with respondent.

2. COI James Kirby began employment with respondent March 1986. He and grievant were co-workers as officers in charge of the Inmate Property Office and State Shop when those offices were located in one physical site. Grievant worked in the state shop approximately three years; Kirby had been assigned to the property office approximately two and one-half years.

3. Several officers felt both men did an equally adequate job on their respective posts and acknowledged each could do the

other man's work when the need arose (T3.15-22). Officer Kirby, though, had a slightly higher rating than grievant on their last performance evaluation as officers in charge of the shop and office.

4. In January 1989, the positions of officer in charge of the Inmate Property Office and State Shop were combined into one position. Respondent chose Officer Kirby to assume the combined position and reassigned grievant to Security. Grievant was subsequently assigned to line duty on the midnight shift.

5. During his tenure in the state shop, grievant had been admonished or counseled about the disorderly condition of his work area, his appearance while on duty, tardiness for work and appearing for work with the odor of alcohol upon his breath.

6. Grievant's supervisor on the state shop assignment, who had to select the officer to retain the combined position, attached importance to an officer's good grooming and demeanor and its impact on the inmate population and less importance to seniority when he made his selection of Kirby over grievant.

7. Unrefuted evidence established that years of service and experience are factors which can influence certain aspects of a correctional officer's employment such as shift assignments and duty-free weekends.

CONCLUSIONS OF LAW

1. It is incumbent upon a grievant to prove all the allegations constituting the grievance by a preponderance of the evidence. Bonnett v. W.Va. Department of Highways, Docket No. 89-DOH-043 (March 29, 1989).

2. The grievant has not demonstrated a violation of department policy or statutory provision governing his employment with respect to management's prerogative to assign correctional officers to specific duties within the prison.

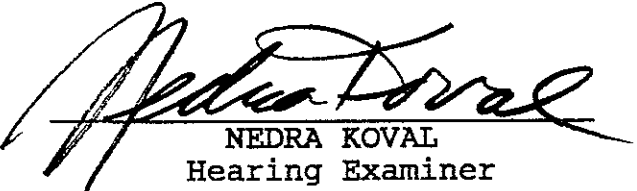
3. The grievant has failed to prove that he was reassigned to line duty as a result of discrimination or favoritism as defined in W.Va. Code §29-6A-2 or that respondent acted arbitrarily or capriciously when Officer Kirby was retained in the unified state shop/property office assignment.

Accordingly, this grievance is **DENIED**; however grievant should discuss with his new supervisor his desire for day shift and weekend free duty, if that is the case, and his preference should be given consideration.

Either party or the West Virginia Civil Service Commission may appeal this decision to the Circuit Court of Marshall County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any

of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate Court.

DATED: June 30, 1989



NEDRA KOVAL
Hearing Examiner